

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF MASSACHUSETTS  
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5 ASTELLAS INSTITUTE FOR  
6 REGENERATIVE MEDICINE,

7 Plaintiff,

Civil Action  
No. 17-CV-12239-ADB

8 v.

August 26, 2020

9 IMSTEM BIOTECHNOLOGY, INC.,  
10 et al.

11 Defendants.

Pages 1 to 16  
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13 TRANSCRIPT OF HEARING VIA ZOOM VIDEOCONFERENCE  
14 BEFORE THE HONORABLE ALLISON D. BURROUGHS  
15 UNITED STATES DISTRICT COURT  
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P R O C E E D I N G S

(The following proceedings were held via Zoom videoconference before the Honorable Allison D. Burroughs, United States District Judge, United States District Court, District of Massachusetts, on August 26, 2020.)

THE CLERK: This is civil action 17-12239, Astellas versus ImStem Biotechnology. Will counsel identify yourselves for the record.

MR. FRAZIER: Good morning. This is David Frazier for Astellas. I'm joined today by Michael Morin and Reba Rabenstein also from Latham & Watkins. We have on the phone in-house counsel from Astellas Dr. Andrea Tiglio and Dr. Yuko Soneoka Gee.

MR. SHANNON: Good morning, Your Honor. Timothy Shannon on behalf of the defendants. I'm joined this morning by Martha Gaythwaite, Ben Stern, and our colleague Travis Waller is observing.

THE COURT: All right. The first papers on preemption have been filed. Mr. Shannon, we also did some quick research on our own, and we'll obviously wait for your response, but it looks like preemption is an affirmative defense that should have been pled. Assuming that turns out to be the case, we're not going to let you plead that now. It's just too late.

MR. SHANNON: Your Honor, just a word about the

1 process here. We've already withdrawn that defense. We  
2 submitted a letter to the Court on Monday identifying that we  
3 had withdrawn the defense.

4 THE COURT: I looked at the docket last night, and  
5 it's not on there. Karen?

6 THE CLERK: I don't know. I'd have to take a look,  
7 too.

8 MR. SHANNON: Your Honor, just so you're aware, we  
9 had a meet and confer, and we told Astellas that we were  
10 withdrawing the defense. There was apparently some sort of  
11 crossing of wires and the paper got filed anyway. As we  
12 indicated in our letter, we're withdrawing it. We won't be  
13 filing anything on Friday. It's moot. And we suggest that  
14 the parties enter a stipulation. Just as Astellas is pulling  
15 back its breach of contract claim and its trade secret  
16 misappropriations claim, we're pulling back that particular  
17 defense, and we can just memorialize it for the Court.

18 THE COURT: Check the docket for me because I don't  
19 think that letter got filed. Just so we have a complete  
20 record. And the other thing, Mr. Frazier, I did tell  
21 Mr. Shannon the last time that he could check with his  
22 client, and I left open the possibility of moving the trial  
23 date depending on what they wanted to do. But Mr. Shannon,  
24 what is it that you think is going to change between  
25 September and November?

1           MR. SHANNON: Thank you, Your Honor. There's been  
2 a couple of developments that we want to keep you apprised  
3 of. First, the defendants have retained an additional set of  
4 Macao counsel. They had previously consulted with the law  
5 faculty at the university who did not give any of us much  
6 hope as to the availability of remote video testimony. So  
7 the client went back after our hearing before the Court and  
8 the Court's determination that the trial would not be kept  
9 open. They went back and retained additional counsel who has  
10 presented a glimmer of hope that it may be possible to make  
11 Dr. Xu available by video.

12           We are still investigating. The communications are  
13 on going, and the research is still developing. But there is  
14 a glimmer of hope that he'll be able to participate by video.

15           Additionally, the latest news from Macao in Hong  
16 Kong, and this is not certain, again we're dealing with  
17 uncertain information that's been translated across countries  
18 and languages, but it's that the border between Macao and  
19 Hong Kong is set to open at the end of September. It's not  
20 entirely clear who will be permitted to travel across that  
21 border, but there is apparently considerable economic  
22 pressure to open that border.

23           Between these two things, that is, either the  
24 development of an alternative route for video testimony  
25 through the construct and advice of this new counsel, or

1 through the opening of the border and Dr. Xu being able to  
2 participate from Hong Kong, we're hopeful, hopeful that  
3 Dr. Xu will be able to participate by video.

4 THE COURT: This is my thinking on the matter. I  
5 will hear from you, Mr. Frazier, after I toss this out there.  
6 I am amenable to moving the trial to November. Not to  
7 Thanksgiving week or the week right after Thanksgiving  
8 because I think that's just a lot to ask of everybody given  
9 the current situation. But I could -- Karen, tell me if I'm  
10 wrong, but I think I could move it to November 2. And that  
11 will give us the week of the 2nd and the week of the 9th with  
12 a little spillover into the 16th if we have technological  
13 issues. It accounts for Veteran's Day if we decide to take  
14 that day off.

15 That's my proposal. It would be a date certain.  
16 And whether or not Dr. Xu is available on that date or not.  
17 But I am willing to move it to that week. Mr. Frazier,  
18 what's your world view?

19 MR. FRAZIER: Well, Your Honor, obviously we have  
20 devoted already a lot of time and resources for preparing for  
21 the September date. There was a representation by the  
22 defendants that they would be ready to go in September when  
23 we had the status conference back in June. Our view is we're  
24 trying to be very flexible. We switched to a bench trial  
25 instead of a jury trial so that we could get to the trial

1 quickly and so forth, and now it turns out that they're not  
2 really ready. And now we have November. But I guess for  
3 clarity, it would certainly be helpful if the Court is  
4 inclined to go with a November date, that this really be the  
5 final, final date.

6 The amount of resources that go into getting ready  
7 and then stopping and then getting ready again is really  
8 tremendous, and it's not something that we want to put our  
9 witnesses or the client through again.

10 THE COURT: Most people can find something to do  
11 with an extra month of preparation just before trial. And  
12 it's only a month. So it's not like you're going to have to  
13 be redoing things that you've already done. It's not six  
14 months.

15 And then I just spent four hours yesterday  
16 listening in on a school committee call in Newton. I'm  
17 worried about September just being a mess for everybody.  
18 We're supposed to resume criminal jury trials on  
19 September 28. I have one in the first batch that may or may  
20 not go those first two weeks if they go at all.

21 I'm worried about September. And I'm also very  
22 disinclined to put this near Thanksgiving in part because  
23 those people that have college kids and stuff like that that  
24 they're going to be coming back home. I'm trying to slot  
25 this into a time that kind of makes sense for what I think

1 people's personal lives are going to look like and give  
2 Dr. Xu some opportunity to participate in this. I take your  
3 point about how they had months to sort this out. I think to  
4 say in the course of a pandemic that if anybody has had  
5 months to do anything is not really -- it doesn't really  
6 reflect reality. We're all trying to adjust what we're doing  
7 a week or even a day at a time.

8 To give Dr. Xu a chance and just for letting things  
9 settle down a little bit after September, I'm just thinking  
10 that November might be a better time to do this for all of  
11 us. It is going to be a date certain, and it will be -- as I  
12 said we've allocated two weeks. I've always tried to keep a  
13 three-week block clear in case there's technological issues,  
14 etc.

15 This has Veteran's Day thrown in there. If we  
16 spill over a little bit -- Karen, I'm right, right, those are  
17 the three weeks that I have open?

18 THE CLERK: Yes.

19 THE COURT: That's what I'm thinking. November 2  
20 and 9, and we'll have those couple of days at the beginning  
21 of the week of the 16th if we end up needing them.

22 MR. SHANNON: Your Honor, Tim Shannon. Can I just  
23 say a word?

24 THE COURT: Mr. Shannon, you should be declaring  
25 victory and going home. But yes, of course you can.



1 MR. SHANNON: Your Honor, yes. Yes. Thank you. I  
2 was going to do it hopefully in a smoother and subtler manner  
3 than that, but yes. We actually anticipated the possibility  
4 of pre Thanksgiving. And had Your Honor not suggested it, we  
5 would have. Pre Thanksgiving is fine. It gives us a nice  
6 deadline, so it encourages all of the staffings back up so we  
7 can go and enjoy Thanksgiving. We think that the legal  
8 research and the border openings will have resolved  
9 themselves one way or another by then.

10 THE COURT: Don't think of this as Thanksgiving  
11 being your hard stop. You should really thinking about  
12 Friday the 13th being your hard stop, but I'm recognizing  
13 there's Veteran's Day, and there might be some technological  
14 issues. Do not think that we're doing this up until  
15 Thanksgiving.

16 MR. SHANNON: Understood, Your Honor. We're all  
17 looking forward to a brisk and efficient trial for sure.

18 THE COURT: All right. November 2. Do you guys  
19 want another final pretrial before then, or do you just want  
20 to convene on the 2nd and get going?

21 MR. SHANNON: Your Honor, could I flag two issues  
22 that may help answer that question?

23 THE COURT: Sure.

24 MR. SHANNON: First, they both concern exhibits.  
25 One is a party access question. The other is a Court access

1 question. With respect to party access, the existing  
2 protective order, of course, is winding down. And with it we  
3 have the question of who can see what. We think it's very  
4 important for all of us, our clients, to be able to see and  
5 to hear about the exhibits that have been presented by  
6 Astellas.

7 To date we've been hampered by Astellas'  
8 confidentiality designations, calling them highly  
9 confidential, and preventing us from either showing or  
10 discussing many of the critical documents with our own  
11 clients. That's been a hindrance so far. We haven't  
12 presented it to the Court because we've tried to actually,  
13 believe it or not, reserve only the most critical fights to  
14 the Court's attention. But it is becoming critical.

15 In the lead up to trial we absolutely need to be  
16 able to discuss with our clients the evidence that's going to  
17 be presented. And we think that requires us to be able to  
18 share, subject to of course the broader protections of the  
19 protective order, use only at trial, etc. And we presented  
20 that issue to Astellas. I know that they're still thinking  
21 about it, but I just want to flag it. Perhaps they can  
22 address that. That's issue number one.

23 Issue number two, which again we don't need to  
24 resolve this morning but I want to flag for the Court, is  
25 there's still a little bit of mechanical question about

1 handling documents in a Zoom trial. Without dragging the  
2 Court into all the technological questions, we think perhaps  
3 the threshold question, the biggest one is who wants paper.

4 Pushing around electronic copies is relatively easy  
5 and there are a number of options, either the chat room,  
6 email or thumb drive. Lot of options there. I think we can  
7 work that out with the Court very easily. A bigger  
8 philosophical question, Your Honor, is whether you or whether  
9 the Clerk also wants them. Again, it's nothing we need to  
10 necessarily resolve today. But if it's going to require  
11 haggling, we might need another conference.

12 THE COURT: I would like paper to the extent  
13 possible because I like to make notes on the paper. But if  
14 there's some that don't end up in paper, I can deal with  
15 that. Emily, are you there? I'm assuming Emily does not  
16 want paper. Do you want paper, Emily?

17 LAW CLERK: Yes, please.

18 THE COURT: Emily would like paper, my law clerk.  
19 We'd like two sets of paper. Karen, do you care?

20 THE CLERK: I don't care. But Joan I think might  
21 want paper, too.

22 THE COURT: Joan, do you want paper?

23 THE COURT REPORTER: No.

24 THE COURT: We would like two sets of paper. I'm  
25 not expecting a Fedex package every night. So if you have an

1 exhibit that you move in and move out, don't worry about.  
2 Especially the important exhibits and any PowerPoints I like  
3 to make notes on as we go.

4 MR. SHANNON: Okay. I think the parties can  
5 probably work out some protocol for getting the paper in  
6 advance of the trial. It may be, Your Honor, for example we  
7 send you some large universe that includes the likely  
8 exhibits, and then you can sort of -- we can all sort of draw  
9 from them as the trial goes instead of having daily Fedex  
10 packages, I think the parties can probably work that out.

11 THE COURT: I did an eight-hour *Markman* hearing  
12 last week, and they each Fedex'd me -- they each Fedex'd me a  
13 binder, and it worked great.

14 MR. SHANNON: I'm confident we can hammer that out  
15 with counsel from Astellas. That just leaves the exhibit  
16 access question, Your Honor. I'm happy to address it now.  
17 I'm not sure how you want to engage that question.

18 THE COURT: I don't know what Mr. Frazier's  
19 position on it is, but the documents that are presented  
20 during the trial will be public, generally speaking. And  
21 that means that they will see them during trial. If I need  
22 to take a recess every five minutes because his clients  
23 haven't seen an exhibit and need to, I'm going to be annoyed.  
24 Mr. Frazier, what's your view?

25 MR. FRAZIER: Your Honor, we have been working

1 under the presumption that all things presented at trial will  
2 be public. And we actually reached an agreement with  
3 Mr. Shannon months ago that would allow his clients to see  
4 the vast majority of the exhibits. And this was brought up  
5 in a meet and confer late last week, and we were preparing a  
6 response to them. I'm confident we can work this out.

7 The only sensitivity here, of course, is whether  
8 his clients need to pour over in their capacity as fact  
9 witnesses documents that they haven't seen over the last 10  
10 to 12 years so that they can further adjust their story and  
11 so forth, but we can deal with that if it appears to be an  
12 issue at trial. I'm really not trying to keep them from  
13 having access to anything. I thought we had largely resolved  
14 the issue.

15 THE COURT: How many hours did we agree for each  
16 side at the end? What did we agree to last time?

17 MR. SHANNON: 25, Your Honor.

18 THE COURT: If we need to take time out for a  
19 witness to look at an exhibit that's been held back, that's  
20 going to be charged against the party that held back the  
21 exhibit.

22 MR. SHANNON: That's fine, Your Honor. Thank you.

23 THE COURT: So that means if somebody has a  
24 strategic reason for having some document that they don't  
25 want the person to see because it's a cross-examination

1 document or whatever, that's fine. But pick your spots  
2 because it's going to count against you.

3 MR. FRAZIER: Understood, Your Honor.

4 MR. SHANNON: Understood.

5 THE COURT: All right. I am going to presume that  
6 we don't need another final pretrial. But if anybody decides  
7 they want one, let us know and we'll schedule it.

8 MR. SHANNON: That's all we have from our end, Your  
9 Honor. Your Honor, could I ask a question? From your  
10 perspective, we're testing out this room and this audio. Is  
11 this audio and this visual acceptable, or do you need louder  
12 or quieter?

13 THE COURT: It's fine. I'm telling you, I'm  
14 sitting here in hurricane winds. So if I can hear you today,  
15 I'm going to be able to hear you under more ideal  
16 circumstances.

17 MR. SHANNON: Thank you, Your Honor.

18 THE COURT: All right. Mr. Frazier, anything from  
19 you.

20 MR. FRAZIER: Nothing from our side, Your Honor.  
21 Thank you.

22 THE COURT: Case is recessed. As much as I like  
23 you all, I would love to have a break from the constant  
24 deluge of letters and we'll see you on November 2. If you  
25 need anything, we're here.

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MR. FRAZIER: Thank you, Your Honor.

(Court recessed at 11:20 a.m.)

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CERTIFICATION

I certify that the foregoing is a correct  
transcript of the record of proceedings in the above-entitled  
matter to the best of my skill and ability.

/s/ Joan M. Daly

October 5, 2020

\_\_\_\_\_  
Joan M. Daly, RMR, CRR  
Official Court Reporter

\_\_\_\_\_  
Date